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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-1256

MICHAEL BARONE, *Petitioner*

v.

SUSAN GRAHAM BARNES, JUDGE, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

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OCTOBER TERM, 1977

No.

MICHAEL BARONE, *Petitioner*

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SUSAN GRAHAM BARNES, JUDGE, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The petitioner, Michael Barone, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on 13 December 1977. Rehearing was denied by the said Court of Appeals

on 18 January 1978. The mandate issued on 26 January 1978. Respondents, defendants in the district court and appellees in the Court of Appeals, are: (1) Hon. Susan Graham Barnes, judge of the District Court in and for the City and County of Denver, State of Colorado; (2) Hon. Richard D. Lamm, Governor of Colorado; (3) Hon. J. D. MacFarlane, Attorney General of Colorado; and, (4) Nicoletta Marie Barone, petitioner in the dissolution of marriage action pending against Michael Barone in the District Court in and for the City and County of Denver, State of Colorado, and the recipient of the alimony awarded to her by the said court.

OPINION BELOW

The judgment and opinion of the United States Court of Appeals for the Tenth Circuit, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment and opinion of the Court of Appeals was entered on 13 December 1977. A petition for rehearing timely was filed on 22 December 1977. Rehearing was denied by the Court of Appeals on 18 January 1978. This Court's jurisdiction is invoked under 28 U.S. Code § 1254.

QUESTIONS PRESENTED

The following questions are presented by the instant petition:

1. Whether, in an action filed prior to 12 August 1976, a single-judge district court errs in failing to certify for hearing and determination by a district court of

three judges a suit seeking to restrain state officials, including the state trial judge, from enforcement of a state statute of state-wide application on the grounds that the statute is unconstitutional on its face and as applied?

2. Whether, in an action filed prior to 12 August 1976, a single-judge district court even has jurisdiction to dismiss such an action, since the case is one required by Act of Congress to be heard by a district court composed of three judges?

3. Whether it is error to brand as "insubstantial" petitioner's claim that the Colorado Uniform Dissolution of Marriage Act impairs the obligation of marriages contracted prior to its passage, in violation of Article I, § 10, of the United States Constitution?

4. Whether it is error to brand as "insubstantial" petitioner's claim that the Colorado Uniform Dissolution of Marriage Act works a deprivation of a spouse's property without due process of law by taking that spouse's property regardless of that spouse's conduct, in violation of the due process clause of the Fifth and Fourteenth Amendments to the United States Constitution?

5. Whether it is error to brand as "insubstantial", while at the same time refusing to entertain evidence, petitioner's claim that the Colorado Uniform Dissolution of Marriage Act, as applied by the courts of Colorado, as a matter of state-wide application, is discriminatory against members of the male sex in that the courts of Colorado show an unwarrantable preference toward members of the female sex in awarding permanent maintenance and support, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution?

6. Whether it is error to brand as "insubstantial" petitioner's claim that the Colorado Uniform Dissolution of Marriage Act authorizes the imposition of involuntary servitude and peonage in violation of the Thirteenth Amendment to the United States Constitution and in violation of 42 U.S. Code § 1994?

7. Whether it is error for the district court (be it a single-judge district court or a three-judge district court) to refuse to entertain evidence and then to dismiss petitioner's action, failing to restrain and enjoin the enforcement, operation and execution of the Colorado Uniform Dissolution of Marriage Act?

STATUTORY PROVISIONS INVOLVED

The Colorado Uniform Dissolution of Marriage Act, Article 10 of Title 14 of the Colorado Revised Statutes, is set forth in full in the Appendix hereto.

STATEMENT OF THE CASE

This is a civil rights suit under 42 U.S. Code §§ 1983 and 1994. Jurisdiction of the district court was founded upon 28 U.S. Code §§ 1343(3), 2201, 2202, 2281, 2283 and 2284. The complaint and motion for three-judge court were filed in the district court on 16 January 1976, prior to enactment of Public Law 94-381. Petitioner sought a declaratory judgment that the Colorado Uniform Dissolution of Marriage Act is unconstitutional, and asked that a three-judge court be impaneled for issuance of a preliminary and permanent injunction restraining the Honorable Susan Graham Barnes, a state divorce judge, and others, from proceeding with the divorce action against

petitioner in the state courts pending determination of the federal constitutional issues in federal court. Petitioner seeks review of the action of the district court refusing to certify the case for three-judge treatment, dismissing his action, and refusing to entertain the same either on a three-judge basis or a single-judge basis.

Petitioner herein, Michael Barone, is the respondent in an action in the District Court in and for the City and County of Denver, State of Colorado, brought under the Colorado Uniform Dissolution of Marriage Act. The said action was filed by Nicoletta Marie Barone, a defendant and appellee in the district court and Court of Appeals, and is pending before the Honorable Susan Graham Barnes, Judge of the said court, also a party hereto.

Petitioner is under continuing orders to pay alimony in the amount of $250.00 per month to his ex-wife, who has a Master's degree, lives alone (Mr. Barone has custody of the two children), and has testified that she is economically self-supporting! (Mrs. Barone contributes not one cent to support her children.)

On 12 July 1976, Judge Barnes refused to recognize petitioner's *England* reservation of all federal issues for determination in the federal courts. On 23 September 1976, Judge Barnes refused to reduce or terminate petitioner's alimony despite a showing that petitioner's income had fallen from $81,957 in 1974 to $9,795 in 1975. On 1 December 1977, the Colorado Court of Appeals affirmed the said action of Judge Barnes. *In re Marriage of Barone*, —— P.2d —— (1976).

In his federal complaint, petitioner asked for a three-judge panel to grant declaratory and injunctive relief against enforcement of the Colorado Uniform Dissolution

of Marriage Act on several grounds of alleged unconstitutionality. The distinguished district court refused to certify the case for three-judge treatment and summarily dismissed petitioner's suit without any evidentiary hearing or oral argument. The Court of Appeals affirmed.

All underlying state issues were determined by the Supreme Court of Colorado, prior to the filing of the instant action, in the case of *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975), thus satisfying the exhaustion requirement. In reliance upon *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), petitioner did not litigate his federal issues in the state courts of Colorado, and it now is too late to do so.

REASONS FOR GRANTING THE WRIT

The steel shackles and iron bars of bondage are every bit as real to the male slaves of the twentieth century as they were to their black counterparts of the nineteenth. Colorado, unfortunately, has not yet emerged from the dark ages into the egalitarian light of the twentieth century. Compare the reasoning of *Neal* v. *Neal*, 570 P.2d 758 (Ariz. 1977) with *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975). It is not surprising that the Colorado courts should resist Mr. Barone's protestations against paying continuing alimony to a lady who has a Master's Degree, lives alone while Mr. Barone has custody of the two children, and has testified that she is economically self-supporting. It is disappointing, however, that the federal district court below succeeded in its effort to "shirk its solemn responsibility to decide federal constitutional questions." See *Kusper* v. *Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973).

Mr. Barone urges four questions presented for review. These will be discussed in order.

1 and 2. THE HONORABLE SINGLE-JUDGE DISTRICT COURT ERRED IN FAILING TO CERTIFY THE INSTANT CASE FOR HEARING BY A DISTRICT COURT OF THREE JUDGES, AND WAS WITHOUT JURISDICTION TO DISMISS THE ACTION.

The complaint was filed and a three-judge court was requested in the instant case on 16 January 1976. The case was one required to be heard and determined by a district court of three judges. *Geisinger* v. *Voss*, 352 F.Supp. 104 (E.D. Wis. 1972); *Wymelenberg* v. *Syman*, 328 F.Supp. 1353 (E.D. Wis. 1971); *McCay* v. *State of South Dakota*, 366 F.Supp. 1244 (D. S.D. 1973); *Franks* v. *Wilson*, 369 F.Supp. 304 (D. Colo. 1973); *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Turner* v. *Fouche*, 396 U.S. 346, 90 S.Ct. 532, 24 L.Ed.2d 567 (1970).

Public Law 94-381 by its own terms does not apply to any action commenced on or before 12 August 1976. Accordingly, the district court should have certified the instant case for three-judge treatment, and erred in not doing so.

Where a case is appropriate for three-judge treatment, the single district judge is without jurisdiction to dismiss the action. *Stratton* v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10.

3. IT IS ERROR TO BRAND AS "INSUBSTANTIAL" A CLAIM THAT THE COLORADO UNIFORM DISSOLUTION OF MARRIAGE ACT IMPAIRS THE OBLIGATION OF MARRIAGES CONTRACTED PRIOR TO ITS PASSAGE, IN VIOLATION OF ARTICLE I, § 10, OF THE UNITED STATES CONSTITUTION.

The Uniform Dissolution of Marriage Act is a law impairing the obligation of marriages contracted prior to its enactment, as was the instant marriage in the case at bar. Even without any written antenuptial agreement, marriage is a contract. The obligations of that contract, whether written or unwritten, may not be impaired by subsequent enactments of the legislature. Mere changes in divorce laws usually are procedural (since they change the remedy afforded for *breach* of the marriage contract: it abolishes the concept of breach altogether, and substitutes an entirely new understanding of the marriage relationship—one that Michael Barone never agreed to when he married Nicoletta.

The classic case concerning impairment of the obligation of a contract is *Dartmouth College* v. *Woodward*, 4 Wheat 518, 4 L.Ed. 629 (1819), argued by Daniel Webster and decided by the Supreme Court early in the history of this nation. The decision of Mr. Chief Justice Marshall and by Mr. Justice Story — the great Joseph Story — is truly a landmark. Concerning no-fault divorces, Chief Justice John Marshall had this to say:

> The provision of the constitution never has been understood to embrace other contracts than those which respect property or some object of value, and confer rights which may be asserted in a court of justice It never has been understood to restrict the general right of the legislature to legislate on the subject of divorces. Those acts enable some tribunal, not to impair a marriage contract, but to liberate one of the parties because it has been broken by the other. When the state legislature shall pass an act annulling all marriage contracts, or allowing either party to annul it without the consent of the other, it will be time

> enough to inquire whether such an act be constitutional.
>
> *Dartmouth College* v. *Woodward*, 4 Wheat 518, 629, 4 L.Ed. 629 (1819).

In his separate opinion, considered by many scholars to be the finest jewel in his crown of legal writings, Mr. Justice Story went into considerably greater detail on the subject of no-fault divorces:

> It is, in the first place, contended that it it not a contract within the prohibitory clause of the constitution, because that clause was never intended to apply to mere contracts of civil institutions, such as the contract of marriage, or to grants of power to state officers, or to contracts relative to their offices, or to grants of trust to be exercised for purposes merely public, where the grantees take no beneficial interest. . . .
>
> As to the case of the contract of marriage, which the argument supposes not to be within the reach of the prohibitory clause, because it is a matter of civil institution, I profess not to feel the weight of the reason assigned for the exception. . . . A general law regulating divorces from the contract of marriage, like a law regulating remedies in other cases of breaches of contracts, is not necessarily a law impairing the obligation of such a contract. It may be the only effectual mode of endorcing the obligations of the contract on both sides. A law punishing a breach of contract, by imposing a forfeiture of the rights acquired under it, or dissolving it because the mutual obligations were no longer observed, is in no correct sense a law impairing the obligations of the contract.

Could a law, compelling a specific performance, by giving a new remedy, be justly deemed an excess of legislative power? Thus far the contract of marriage has been considered with reference to general laws regulating divorces upon breaches of that contract. But if the argument means to assert that the legislative power to dissolve such a contract, without any breach on either side, against the wishes of the parties, and without any judicial inquiry to ascertain a breach, I certainly am not prepared to admit such a power, or that its exercise would not entrench upon the prohibition of the constitution. If under the faith of existing laws a contract of marriage be duly solemnized, or a marriage settlement be made (and marriage is always in law a valuable consideration for a contract), it is not easy to perceive why a dissolution of its obligations, without any default or assent of the parties, may not as well fall within the probibition as any other contract for a valuable consideration. A man has just as good a right to his wife as to the property acquired under a marriage contract. He has a legal right to her society and her fortune; and to devest such right without his default, and against his will, would be as flagrant a violation of the principles of justice as the confiscation of his own estate. I leave this case, however, to be settled when it shall arise.

Dartmouth College v. *Woodward*, 4 Wheat 518, 693-697, 4 L.Ed. 629, 673-674 (1819).

And there are other cases so holding. In *Lawrence* v. *Miller*, 2 N.Y. 245 (1849), New York's highest court held that a marriage contract is protected by the federal contract clause against impairment of its obligations by subsequent enactments of the legislature. In *Wesson* &

Hunting v. *Johnson*, 66 N.C. 189 (1872), the Supreme Court of North Carolina held that: "Acts of the General Assembly, restoring to married women, their common law right of dower, are unconstitutional, so far as they apply, to marriages contracted prior to their passage." Ruled the North Carolina court:

> It impairs the obligation of a contract. Marriage is a civil contract, and the rights growing out of it, are entitled to the protection of the Constitution of the United States.
>
> *Wesson & Hunting* v. *Johnson*, 66 N.C. 189, 191 (1872).

In *Bouknight* v. *Epting*, 11 S.C. 71 (1878), the Supreme Court of South Carolina held that a marriage contracted prior to the enactment of the married woman acts remains outside such acts, since any other construction would bring the acts into conflict with that provision of the Constitution of the United States which forbids a state from passing any law impairing the obligation of contracts. Accordingly, property acquired by the wife in her own name, despite passage of the act authorizing same and removing the disabilities of coverture, was held nevertheless to be subject to the claims of the husband's creditors. In *Atkinson* v. *Atkinson*, 203 N.Y.S. 49, 207 App. Div. 660 (1924), *aff'd* 203 N.Y.S. 372, 121 Misc. 659 (1923), the Appellate Division of the New York Supreme Court again held that marriage is a "contract" the obligation of which may not be impaired by a subsequent enactment of the legislature. See also *Cavanaugh* v. *Valentine*, 41 N.Y.S.2d 896, 181 Misc. 48 (1943).

A federal question clearly is presented. In *Irving Trust Co.* v. *Day*, 314 U.S. 556, 62 S.Ct. 398, 86 L.Ed. 452 (1942), the Supreme Court of the United States said:

> When this Court is asked to invalidate a state statute upon the grounds that it impairs the obligation of a [marriage] contract, the existence of the contract and the nature and extent of its obligation become federal questions for the purposes of determining whether they are within the scope and meaning of the Federal Constitution, and for such purposes finality cannot be accorded to the views of state court.
>
> *Irving Trust Co.* v. *Day*, 314 U.S. 556, 561, 62 S.Ct. 398, 86 L.Ed. 452 (1942).

The *Day* case was litigated in the state courts without an England reservation, and was appealed from the state's highest court to the Supreme Court of the United States in the traditional manner. In the 1964 case of *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964), the Supreme Court approved the procedure that petitioner has elected to follow in the instant case.

Accordingly, the courts below erred in branding as "insubstantial" petitioner's claim that Colorado's "no-fault" divorce law violated the contract clause, and that this honorable court should so hold.

4. *IT IS ERROR TO BRAND AS "INSUBSTANTIAL" A CLAIM THAT THE COLORADO UNIFORM DISSOLUTION OF MARRIAGE ACT WORKS A DEPRIVATION OF A SPOUSE'S PROPERTY WITHOUT DUE PROCESS OF LAW BY TAKING THAT SPOUSE'S PROPERTY REGARDLESS OF THAT SPOUSE'S CONDUCT, IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.*

Petitioner suggests that the Uniform Dissolution of Marriage Act, both on its face and as applied, is unconstitutional in that it works a continuing deprivation of appellant's property regardless of his conduct. At the time Michael Barone married, in faith on existing laws, he could not be divorced and subjected to permanent alimony unless he misbehaved in certain specific ways enumerated in the existing statutes. The effect of the no-fault enactment is to give Mrs. Barone continuing eminent domain over her former husband's property, in violation of the due process clauses.

"Irretrievable breakdown" is not, and cannot be, a valid ground for dissolution of marriage. The Colorado standards are unconstitutionally overbroad and impermissible vague in that they do not inform petitioner of the situation required to justify dissolution of his marriage or imposition of continuing alimony obligations.

Parliament in England has enacted a no-fault divorce law. But the British version elaborately defines the term "irretrievably broken down." About the definitions that appear in the English version (but which are singularly absent in the Colorado version) Judge Ormrod of the Queen's Bench Division of the High Court of Justice had this to say:

> The question of irretrievable breakdown has not, therefore, been left at large for the court to determine, no doubt because it was realized that, except in the clearest cases, this is not a justifiable issue. Without guide lines the court has no means of judging what one person, let alone two, may decide to do in the future in relation to their marriage if there is any doubt about it . . . .

Applying this test to the facts of the present case I have no hesitation in holding that there is nothing in respondent's behaviour which could be regarded as a breach on her part of any of the obligations of the married state or as effectively contributing to the break-up of the marriage. . . . Petition dismissed.

Pheasant v. *Pheasant*, [1972] Q.B. (Family Div.) 202, 206, 209, 1 All. E.R. 587, 589, 591, 592.

Certainly the term "irretrievable breakdown" is every bit as vague as the term "contemptuous treatment." *Smith* v. *Goguen*, 415 U.S. 556, 94 S.Ct. 1242, 39 L.Ed.2d 605 (1974). It has been held that: "Vague laws in any area suffer a constitutional infirmity." *Ashton* v. *Kentucky*, 384 U.S. 195, 86 S.Ct. 1407, 1410, 16 L.Ed.2d 469 (1966). Anent the doctrine of void-foe-vagueness, see also *Zwickler* v. *Koota*, 389 U.S. 241, 88 S.Ct. 391, 19 L.Ed.2d 44 (1967).

Accordingly, the courts below erred in branding as "insubstantial" petitioner's claim that Colorado's "no-fault" divorce law violates the due process clauses of the Fifth and Fourteenth Amendments.

5. It IS ERROR TO BRAND AS "INSUBSTANTIAL", WHILE AT THE SAME TIME REFUSING TO ENTERTAIN EVIDENCE, A CLAIM THAT THE COLORADO UNIFORM DISSOLUTION OF MARRIAGE ACT, AS APPLIED BY THE COURTS OF COLORADO, AS A MATTER OF STATEWIDE APPLICATION, IS DISCRIMINATORY AGAINST MEMBERS OF THE MALE SEX IN THAT THE COURTS OF COLORADO SHOW AN UNWARRANTABLE PREFERENCE TOWARD MEMBERS OF THE FEMALE SEX IN AWARDING PERMANENT MAINTENANCE AND SUPPORT, IN VIOLATION OF THE EQUAL

PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Mrs. Barone has a Master's degree, and has testified that she is self-supporting. Mr. Barone has custody of the two children, and Mrs. Barone is not contributing one cent to their financial support. Yet Mr. Barone must pay maintenance to Mrs. Barone.

The honorable district court dismissed petitioner's complaint summarily, without giving petitioner an opportunity to prove that the courts of Colorado, as a matter of statewide application and as a matter of state common law, are quicker to force husbands to support their former wives than to force wives to support their former husbands. Indeed, a paternalistic, stereotyped presumption in favor of the female litigant is mandated by decisional law from the Supreme Court of Colorado. See, *e.g.*, *Kane* v. *Kane*, 154 Colo. 440, 391 P.2d 361 (1964), in which the state's highest court reaffirms the proposition that females are to be given perference in obtaining custody of children of tender years. See also *McPheeters* v. *McPheeters*, 132 Colo. 312, 287 P.2d 959 (1955), in which the Supreme Court held that the husband has the duty to support the wife, even though he is poor. See also *Taylor* v. *Taylor*, 7 Colo. App. 549, 44 P. 675 (1896), holding that a wife is entitled to suit money since the male spouse has the burden of putting the female spouse on equal footing in the litigation. Nor has the sexist standard changed since enactment of the no-fault law. *In re Marriage of Moore*, 531 P.2d 995 (Colo. App. 1975); *People* v. *Elliott*, 525 P.2d 457 (Colo. 1974).

The above-cited Colorado cases are state "laws," "customs" and "usages" within the meaning of 42 U.S.

Code § 1983, denying appellant his federally protected rights. *Erie R. Co.* v. *Thompkins*, 304 U.S. 64, 71-72, 58 S.Ct. 817, 819, 82 L.Ed. 1188 (1938). *Accord*, *Warren* v. *United States*, 340 U.S. 523, 326, 71 S.Ct. 432, 434, 95 L.Ed. 504 (1951), holding that "The term law in our jurisprudence usually includes the rules of court decisions as well as legislative acts."

In the court below, petitioner would have proven his inability to obtain equal treatment under the state divorce law as applied by showing evidence of clear discrimination. At the evidentiary hearing, petitioner would have introduced the State Court Administrator's summary of domestic relations terminations for 1972 (being the last year for which such statistics were kept). That summary shows that, during 1972, female litigants were awarded custody of all children born of the marriage in 4358 cases, whereas the hapless husband got the kids in only 251 cases. The mere statistical disparity creates a presumption of sexual discrimination. Thus, in *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002, 1008, (W.D. Pa. 1973), the United States District Court for the Western District of Pennsylvania said:

> We agree that the statistics and other evidence of discrimination showing the imbalance of men and women with tenure in the School of Medicine and the Department of Biochemistry in particular make out a prima facie case which imposes upon the defendant the duty to go forward with rebutting evidence.
>
> *Johnson* v. *University of Pittsburgh*, 359 F.Supp. 1002, 1008, (W.D. Pa. 1973).

Accord, *Penn* v. *Eubanks*, 360 F.Supp. 699, 703 (M.D. Ala. 1973); *Associated General Contractors of Massachusetts, Inc.* v. *Altshuler*, 361 F.Supp. 1293 (D. Mass. 1973), *aff'd*, 409 F.2d 9 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974).

In further support of his position, petitioner would have introduced testimony and other statistical evidence as to the inability of a male to obtain equal treatment under the present Colorado divorce law as applied. It is settled that unconstitutionality *as applied* is sufficient to require the empaneling of a three-judge court. *Steffel* v. *Thompson*, 415 U.S. 452, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974); *Geisinger* v. *Voss*, 352 F.Supp. 104 (E.D. Wis. 1972).

At the very least, the question whether sexist standards in divorce violate the equal protection clause is sufficiently justiciable to have required the district court to certify the case for hearing by three judges. At the very least, the matter should have been heard by a single-judge district court and it was error to deny petitioner his day in court to present evidence. *Stanton* v. *Stanton*, 421 U.S. 7 (1975); *Taylor* v. *Louisiana*, 419 U.S. 522 (1975); *Reed* v. *Reed*, 404 U.S. 71 (1971); *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); Comment, *Male Alimony in Light of the Sex Discrimination Decisions of the Supreme Court*, 6 Cumberland L. Rev. 590 (Winter 1976). See also the enlightened decisions of several state courts applying the Fourteenth Amendment to the domestic relations situation as mandating equal treatment for males in divorce: *Conway* v. *Dana*, 318 A.2d 324, 326 (Pa. 1973), *State ex rel. Watts* v. *Watts*, 350 N.Y.S.2d 285 (1973); *Carole K.* v. *Arnold K.*, 380 N.Y.S.2d 593 (1976), in which Judge Nanette Dembitz, observes that "sexual generalization in the law of support is the quintessence of unconstitutionality."

Accordingly, it is submitted that the courts below erred in branding as "insubstantial" petitioner's claim that the Colorado Uniform Dissolution of Marriage Act, as

applied by the courts of Colorado, is discriminatory against members of the male sex in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

6. IT IS ERROR TO BRAND AS "INSUBSTANTIAL" A CLAIM THAT THE COLORADO UNIFORM DISSOLUTION OF MARRIAGE ACT AUTHORIZES THE IMPOSITION OF INVOLUNTARY SERVITUDE AND PEONAGE IN VIOLATION OF THE THIRTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND IN VIOLATION OF 42 U.S. CODE § 1994.

Even after a marriage has been dissolved, and even though dissolved through the fault of the person seeking maintenance, the Colorado statute permits the court to command the innocent party to labor to the profit of the guilty spouse. The command is issued by the courts of Colorado not in the form of a mere money judgment, but rather under coercion of imprisonment for noncompliance. The steel shackels and iron bars of bondage are every bit as real to the male slaves of the twentieth century as they were to their Black counterparts of the nineteenth. The State of Colorado has erected a vast statutory structure for the purpose of imposing involuntary servitude upon persons even beyond the duration of the marriage relationship. Under Colorado's statutory scheme, even the guilty spouse at fault is made master over the life and fortune of the innocent spouse. This is doubly injust now that Colorado purports to allow the spouse at fault to terminate the conjugal relationship unilaterally. *In re Marriage of Franks*, 542 P.2d 845 (Colo. 1975). The other spouse is left with all the burdens and none of the benefits of the marriage contract.

To start collecting alimony, all she (and it usually is the "she" — this relates to the separate issue of sexual discrimination, *supra*) need do is show a lack of sufficient property to support herself.

To force a human being thus to labor to pay another's debts, when a viable marriage relationship no longer exists between them, and particularly when today's marriage relationship is terminable at the unilateral option of the person seeking court appointment as taskmaster, constitutes slavery and peonage. The only cases to the contrary are from states where maintenance may not be awarded without a showing of fault on the person being subjected to liability. Such cases, therefore, are not in point.

It is no answer that petitioner voluntarily entered into the contract of marriage, since 42 U.S. Code § 1994 prohibits persons from binding themselves into indenture and prohibits the state from incarcerating persons for quitting work or using the threat of incarceration to hold unwilling persons to labor. *Peonage Cases*, 136 F. 707 (D. Ark. 1904); *Pollock* v. *Williams*, 322 U.S. 4, 64 S.Ct. 792, 88 L.Ed. 1095 (1944). Marriage is a contract. In *Peonage Cases*, 123 F. 671 (D. Ala. 1903), it was held that any contract giving another the right to exact compelled labor in liquidation of some debt or obligation is invalid, and treated as though made involuntarily, and affords the creditor or master no protection.

The essence of peonage is compulsory service in payment of a debt, a "peon" being one who is compelled to work for his creditor until his debt is paid. *Bailey* v. *Alabama*, 219 U.S. 219, 31 S.Ct. 146, 55 L.Ed. 191 (1911). A "peon" is a "species of serf, compelled to work for his creditor until his debts are paid." *In re Lewis*, 114 F. 963 (C.C. Fla. 1902). In divorce cases, the debt is never paid.

It is no answer that the peonage is authorized by state law. *Taylor* v. *Georgia*, 315 U.S. 25, 62 S.Ct. 415, 86 L.Ed. 615 (1942). 42 U.S. Code § 1994 expressly provides:

> The holding of any person to service or labor under the system known as peonage is abolished and forever prohibited in any Territory or State of the United States; and all acts, laws, resolutions, orders, regulations, or usages of any Territory or State, which have heretofore established, maintained, or enforced, or by virtue of which any attempt shall hereafter be made to establish, maintain, or enforce, directly or indirectly, the voluntary or involuntary service or labor of any persons as peons, in liquidation of any debt or obligation, or otherwise, are declared null and void.
>
> 42 U.S. Code § 1994.

Additionally, the Thirteenth Amendment mandates that:

> Neither slavery nor involuntary servitude, except as punishment for crime, whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> U.S. Constitution, Amend. XIII.

If courts exist to end injustices, then the time is now for this honorable Court to hold that maintenance, at most, may be the object of no more than an ordinary money judgment; and to abolish maintenance altogether where the marriage relationship has been terminated by the person seeking to profit from his or her own breach of that contract without any showing of fault on the part of the other

party. The Arizona Supreme Court has been progressive enough to realize the injustices perpetrated upon both sexes by the stereotyped notion of alimony in the no-fault situation. *Neal* v. *Neal*, 570 P.2d 758 (Ariz. 1977). Unfortunately, not all states have been so courageous. However, there are important federal issues involved.

Involuntary servitude, whether imposed upon Blacks, upon males, or even without discrimination as to color or sex, cannot survive constitutional scrutiny. See *Plessy* v. *Ferguson*, 163 U.S. 537, 542 (1896); *Clyatt* v. *United States*, 197 U.S. 207, 215 (1905); *Bailey* v. *Alabama*, 219 U.S. 219, 240-241, 31 S.Ct. 146, 55 L.Ed. 191 (1911). In *Bailey*, the Supreme Court said:

> While the immediate concern was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag.
>
> The words involuntary servitude have a "larger meaning than slavery." . . . The plain intention was to abolish slavery of whatever name and form and all its badges and incidents; to render impossible any state of bondage; to make labor free, by prohibiting that control by which the personal service of one man is disposed of or coerced for another's benefit which is the essence of involuntary servitude.
>
> *Bailey* v. *Alabama*, 219 U.S. 219, 240-241, 31 S.Ct. 146, 55 L.Ed. 191 (1911).

The mutual obligation of support (and the obligation of support must always be mutual) existing between parent and child is an exception to this rule. *Peonage Cases*, 132 F. 671, 681, (M.D. Ala. 1903); *Clyatt* v. *United States*,

197 U.S. 207, 215 1905). But the cases make no corresponding exception for the relationship between a spouse and a former spouse. To treat children as helpless is logical; to treat women as helpless is insulting to womanhood.

Accordingly, it is submitted that the courts below erred in branding as "insubstantial" petitioner's proposition that the Colorado Uniform Dissolution of Marriage Act violates the constitutional and statutory prohibitions against involuntary servitude and peonage.

7. IT IS ERROR FOR THE DISTRICT COURT (BE IT A SINGLE-JUDGE DISTRICT OR A THREE-JUDGE DISTRICT COURT) TO REFUSE TO ENTERTAIN EVIDENCE AND THEN TO DISMISS PETITIONER'S ACTION, FAILING TO RESTRAIN AND ENJOIN THE ENFORCEMENT, OPERATION AND EXECUTION OF THE COLORADO UNIFORM DISSOLUTION OF MARRIAGE ACT.

Petitioner submits that the district court was without jurisdiction to dismiss the action. *Stratton* v. *St. Louis S.W. Ry. Co.*, 282 U.S. 10. An injunction should have issued. *England* v. *Louisiana State Board of Medical Examiners*, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440 (1964); *Mitchum* v. *Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972); *Zwicker* v. *Koota*, 389 U.S. 31, 88 S.Ct. 391, 19 L.Ed.2d 444 (1967); *Bailey* v. *Patterson*, 369 U.S. 31, 82 S.Ct. 549, 7 L.Ed.2d 512 (1962); *Kusper* v. *Pontikes*, 414 U.S. 51, 94 S.Ct. 303, 38 L.Ed.2d 260 (1973); *Carter* v. *Stanton*, 405 U.S. 669, 92 S.Ct. 1232, 31 L.Ed.2d 569 (1972); *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

It should be noted that the honorable Judge Barnes does not enoy judicial immunity from such an injunction.

Wood v. *Strickland*, 95 S.Ct. 992, 997 footnote 6 (1975); *Larsen v. Gallogly*, 361 F.Supp. 305, 310-311 (D. R.I. 1973), *vacated and remanded with instructions to dismiss as moot*, 95 S.Ct. 819, 42 L.Ed.2d 831 (1975); *Mon Chi Hueng Au* v. *Lum*, 360 F.Supp. 219 (D. Haw. 1973); *Geisinger* v. *Voss*, 352 F.Supp. 104 (E.D. Wis. 1972).

Accordingly, it is submitted that the honorable district court erred in failing to restrain and enjoin the enforcement, operation and execution of the Colorado Uniform Dissolution of Marriage Act and in dismissing the action.

THE QUESTIONS ARE SUBSTANTIAL

President Ford was right when he said: "Women's liberation is truly the liberation of all people." Changing concepts of woman's role in society, and of the obligations (or lack of obligations) within marriage is redefined by the Colorado legislature, make post-divorce alimony sadly anachronistic in these enlightened times. Women no longer desire to be stereotyped as witless, helpless creatures unable to fend for themselves. Alimony is a holdover from earlier days when the entire rationale of divorce and marriage was different — predicated on postulates that, perhaps unfortunately, no longer obtain.

Today, alimony for a self-sufficient woman is unjust. An indolent woman no longer should be rewarded for her otiosity at the expense and to the punishment of her former husband.

In J. Johnston & C. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. Law Review 675, 747 (1971), it is said:

Another aspect of the judicial role is the responsibility to be *ahead* of other men. Judges are not entitled to the luxury of shielding themselves behind public opinion or community attitudes, however strongly held those may be. The judiciary thus cannot shift responsibility to the legislatures, the press, women's liberation activists or anyone else. A judge whose opinions on important questions of public policy reflect nothing more than his private estimate of public majority opinion is engaging in journalism, not jurisprudence.

J. Johnston & C. Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. Law Review 675, 747 (1971) (emphasis in original).

The Colorado state courts, and unfortunately the Colorado federal courts too, have declined the invitation to bring the application of the state's divorce laws out from the dark ages into the light of the twentieth century. The question now presented this honorable Court is whether concepts of equality and justice are mere empty platitudes or meaningful principles. Michael Barone has confidence that this distinguished tribunal courageously will breathe fire, meaning and life into those concepts by ending male slavery to the profit of female indolence. Mr. Barone has faith that this honorable Court will not hestitate to require Mrs. Barone to exercise her newly-gained rights to equal employment opportunity to the end that she no longer needs be dependent upon her former husband.

CONCLUSION

Michael Barone so prays: that a writ of certiorari should issue to review the judgment and opinion of the Tenth Circuit.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX A

NOT FOR ROUTINE PUBLICATION
UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MICHAEL BARONE,
Plaintiff-Appellant,

v.

HON. SUSAN GRAHAM BARNES, HON. RICHARD D. LAMM, HON. J. D. MacFARLANE, NICOLETTA MARIE BARONE,
Defendants-Appellants.

No. 76-1748

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLORADO
(D.C. No. 76-M-58)

Submitted: November 15, 1977

Maurice R. Franks, Pueblo, Colorado, for Appellant.

Mary J. Mullarkey, First Assistant Attorney General, (J. D. MacFarlane, Attorney General, Jean E. Dubofsky, Deputy Attorney General, and Edward G. Donovan, Solicitor General, on the brief), Denver, Colorado, for Appellees.

Before SETH, HOLLOWAY and BARRETT, Circuit Judges.

BARRETT, Circuit Judge.

Plaintiff and appellant Michael Barone brought this action in federal district court challenging the constitutionality of pending state court proceedings for the dissolution of his marriage. Barone sought a declaratory judgment that the Colorado Uniform Dissolution of Marriage Act, 1973 C.R.S. §§14-10-101, et. seq., is unconstitutional. He also sought a permanent injunction restraining the state court from proceeding with the dissolution action. Barone requested a three-judge court pursuant to 28 U.S.C.A. §2281.[1]

Defendants and appellees are the state court judge who presided at the dissolution proceedings, the governor of Colorado, the attorney general of Colorado and Barone's former wife. All defendants moved for dismissal of the complaint. The district court found that none of Barone's contentions was sufficient to raise a substantial federal question. The court accordingly ruled that it was not necessary to convene a three-judge court. The court then granted defendants' motions to dismiss for failure to state a claim.

Barone was the respondent in a Colorado state court action brought under the Colorado Uniform Dissolution

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[1] 28 U.S.C.A. §2281, now repealed, stated:

> An interloctory or permanent injunction restraining the enforcement, operation or execution of any State statute by restraining the action of any officer of such State in the enforcement or execution of such statute or of an order made by an administrative board or commission acting under State statutes, shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application thereof is heard and determined by a district court of three judges under section 2284 of this title.

28 U.S.C.A. §2284 describes the composition and procedure of a three-judge court.

of Marriage Act, *supra*, by his then wife, appellee Nicoletta Marie Barone. The Act provides in pertinent part that "irretrievable breakdown of the marriage" is the only ground for dissolution (C.R.S. §§14-10-102, 14-10-106), and that an award of maintenance shall be without regard to marital misconduct (C.R.S. §14-10-114 (2)). The Colorado court dissolved Barone's marriage and ordered him to make monthly payments to his former wife.

Barone asserts that the Colorado Act:

1. Impairs the obligations of his marriage contract in violation of Article I, Section 10 of the United States Constitution;

2. Works a deprivation of a spouse's property without due process of law, in violation of the Fifth and Fourteenth Amendments;

3. Discriminates against males in violation of the Equal Protection Clause of the Fourteenth Amendment; and

4. Authorizes the imposition of involuntary servitude in violation of the Thirteenth Amendment.

Barone does not have standing to raise the Equal Protection argument. His other contentions are without merit.

Marriage is contractual in that "the consent of the parties is necessary to create the relation." Randall v. Kreiger, 90 U.S. 137, 147 (1874). But marriage is not a contract within the meaning of Article I, Section 10 of the United States Constitution. Maynard v. Hill, 125 U.S. 190 (1888). As the Supreme Court observed in Maynard v. Hill, *supra*, quoting the Supreme Court of Maine:

(When a couple are married) they have not so much entered into a contract as into a new relation, the rights, duties, and obligations of which rest not upon their agreement, but upon the general law of the State, statutory or common, which defines and prescribes those rights, duties and obligations. They are of law, not of contract. It was of contract that the relation should be established, but, being established, the power of the parties as to its extent or duration is at an end. Their rights under it are determined by the will of the sovereign, as evidenced by law. . . . It is not, then a contract within the meaning of the clause of the Constitution which prohibits the impairing of the obligation of contracts. It is, rather, a social relation, like that of parent and child, the obligations of which arise not from the consent of concurring minds, but are the creation of the law itself . . .

125 U.S., at 211.

The Colorado Act, therefore, does not violate Article I, Section 10 of the United States Constitution.

Barone's argument that he was denied due process must also be rejected. Before the Act was passed in 1971, Barone asserts, only those spouses who had misbehaved could be divorced and ordered to make support payments. Now, under the new Act, even a faultless spouse may have to pay the former mate. Barone complains that he married "in faith" upon the former law. Perhaps he did. The Act, however, did not apply to past events, but only those to come. Such a one was Barone's divorce. Nothing prevents a legislature from declaring that, henceforth, the conditions of liability are changed. Barone's expectancy of what the marriage statutes in Colorado would be is no more an interest protected by the law than are the hopes of a wealthy testator that Congress will not increase federal estate taxes the following year.

The term "irreconciliable breakdown" is not an unconstitutionally vague ground for dissolution, as Barone contends.[2] If the term can reasonably be interpreted as meaning other than "on the rocks for good," Barone has not suggested what that interpretation would be. The Colorado Supreme Court in In Re Marriage of Franks, —— Colo. ——, 542 P.2d 845 (1975), *cert. denied*, 423 U.S. 1043, 96 S.Ct. 766 (1976), said:

> Where the objects of the marital relationship are destroyed to such an extent that it seems improbable that the couple will again resume their relationship of husband and wife, the marriage is irretrievably broken. This is, of course, a determination to be made under the statute by the trial judge on the basis of all the facts and circumstances, and the factors underlying the determination made will necessarily vary in each case depending upon the mutual tolerance or lack of tolerance of the spouse.
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> 542 P.2d, at 851.

The Florida Supreme Court resorted to Webster's Third International Dictionary (1966) in the case of *Ryan* v.

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[2] The allegedly vague statute does not in itself take property. It simply recites the ground for dissolution. C.R.S. §14-10-102. The statute which authorizes support payments is C.R.S. §14-10-114, and Barone does not allege that statute to be vague. We consider Barone's contention because there can be no support payments without a dissolution. We do not find Colorado's ground for divorce to be vague, but even if we did, we would be loath to intrude in a domain that has traditionally been the concern of the separate States. See Scherrer v. Scherrer, 334 U.S. 343 (1948). (Frankfurter, J., dissenting.)

Ryan, 277 So. 2d 266 (1973), and found the word "irretrievably" to be clearly defined. The Florida court rejected, as we do, a challenge to a "no-fault" divorce statute on grounds of vagueness.

In support of his equal protection argument, Barone contends that he is prepared to prove that the Colorado courts apply the Uniform Dissolution of Marriage Act in a discriminatory manner. That is not enough. With few exceptions, a statute may be challenged only by those it has injured. *United States* v. *Raines*, 362 U.S. 17 (1960). Barone has not alleged that the Colorado state court treated him more harshly than it would a woman with like education, earnings and health whose former spouse had the education, earnings and health of Nicoletta Marie Barone. The once instance where Barone darts from his refuge of conclusory charges of discrimination against males is to cite the State Court Administrator's summary of domestic relations terminations for 1972. That summary shows that, during 1972, female litigants were awarded custody of all children born of the marriage in 4358 cases, whereas male litigants were awarded custody in only 251 cases. Inasmuch as Barone was awarded custody of both his children, the statistical disparity he discusses does nothing to enhance his standing to challenge the Act. Barone cites several Colorado cases which allegedly enforce "a paternalistic, stereotyped presumption in favor of the female litigant." None of the decisions require the state court to discriminate against Barone in applying the Act. As we view it, even could the statistics and case law be read as implying injury to Barone, which they cannot, such allegations of injury must be pleaded in the complaint. These "allegations" are set forth only in Barone's brief on appeal. The district court properly relied on its earlier decision in *Harrington* v. *Shannon*, D. Colo. 75-M-738, in finding the

conclusory allegations in Barone's complaint to be insufficient to state a claim upon which relief can be granted.

Barone also argues that the Act authorizes the imposition of involuntary servitude in violation of the Thirteenth Amendment. The Act, he contends, allows a court to coerce support payments from a faultless former spouse under penalty of imprisonment. *See* C.R.S. §14-10-118. We do not think Barone has been cast into slavery or involuntary servitude as those terms are used in the Thirteenth Amendment. In *Clyatt* v. *United States*, 197 U.S. 207 (1905), *Bailey* v. *Alabama*, 219 U.S. 219 (1911), *United States* v. *Reynolds*, 235 U.S. 133 (1914), *Butler* v. *Perry*, 240 U.S. 328 (1915), and the Selective Draft Law Cases, 245 U.S. 366 (1918), all dealing with the issue of involuntary servitude, we find nothing that would prevent Colorado from ordering Barone to make support payments or be sent to jail. It is coerced labor that the Thirteenth Amendment proscribes, and not all coerced labor at that. Persons may be put to work at established state activities, such as road construction (*Butler* v. *Perry*, *supra*) and warmaking (Selective Draft Law Cases, *supra*), or to honor duties which society considers exceptional, such as the service of a sailor, and obligations of a child to its parents (*Clyatt* v. *United States*, *supra*). Barone is not being forced to labor at the point of a gun. However, even should some forced labor be imposed upon Barone following his failure to make the support payments as ordered, there would be room for argument that his obligations to his former wife are of the exceptional nature of those mentioned in *Clyatt*. The Colorado Supreme Court observed in the case of In Re Marriage of Franks, *supra*:

> Where two parties have undertaken the obligations implicit in the marriage relationship, it becomes the duty of the courts upon the dissolution of that rela-

tionship to ensure that neither is forced to suffer unduly as a consequence of its termination. One spouse may have foregone earning potential in performing the domestic duties involved in maintaining the marital domicile, to the end that the other spouse might devote his full potential to the earning of income for the family. It would be inequitable upon dissolution to saddle the former with the burden of his reduced earning potential and allow the latter spouse to continue in an advantageous position which was reached through a joint effort. Thus, the dissolution of marriage statute, in an effort to eliminte the inequities resulting from the termination of the relationship, provides for attorney's fees, as well as maintenance and child support, when the relative status of the parties involved indicates the need of such.

542 P.2d, at 851, 852.

The involuntary servitude argument is without merit.

The district court did not err in dismissing the complaint without having convened a three-judge court. 28 U.S.C.A. §2281 did not require a single district judge to convene a three-judge court if the constitutional claims were "insubstantial." *Swift & Co.* v. *Wickham*, 382 U.S. 111, 115 (1965). We agree with the district court finding that none of Barone's contentions present a substantial federal question. Each of Barone's contentions has been heretofore raised by other litigants before other courts, and each has been rejected. *See Blackman v. Byrne*, D. Colo. 75-F-1269; *Franks* v. *McFarlane*, D. Colo. C-5266; *Greer* v. *Wolvington*, D. Colo. 75-W-745; *Harrington* v. *Shannon*, *supra;* In Re Marriage of Franks, *supra.*

WE AFFIRM.

APPENDIX B

NOVEMBER TERM — January 18, 1978

Before Honorable Oliver Seth, Honorable William J. Holloway, Jr., and Honorable James E. Barrett, Circuit Judges

MICHAEL BARONE,
Plaintiff-Appellant,

vs.

HONORABLE SUSAN GRAHAM BARNES, HONORABLE RICHARD D. LAMM, HONORABLE J. D. Mac FARLANE, and NICOLETTA MARIE BARONE,
Defendants-Appellees.

No. 76-1748

This matter comes on for consideration of appellant's petition for rehearing in the captioned case.

Upon consideration whereof, the petition for rehearing is denied.

HOWARD K. PHILLIPS, Clerk

APPENDIX C

TEXT OF COLORADO UNIFORM DISSOLUTION OF MARRIAGE ACT

Article 10 of Title 14, Colorado Revised Statutes

14-10-101. *Short title.* This article shall be known and may be cited as the "Uniform Dissolution of Marriage Act".

14-10-102. *Purposes - rules of construction.* (1) This article shall be liberally construed and applied to promote its underlying purposes.

(2) Its underlying purposes are.

(a) To promote the amicable settlement of disputes that have arisen between parties to a marriage;

(b) To mitigate the potential harm to the spouses and their children caused by the process of legal dissolution of marriage; and

(c) To make the law of legal dissolution of marriage more effective for dealing with the realities of matrimonial experience by making an irretrievable breakdown of the marriage relationship the sole basis for its dissolution.

14-10-103. *Definition and interpretation of terms.* (1) As used in this article, unless the context otherwise requires, the term "decree" includes the term "judgment", and, for the purpose of the tax laws of the state of Colorado or of any other jurisdiction, the term "maintenance" includes the term "alimony".

(2) Whenever any law of this state refers to or mentions divorce, annulment, or separate maintenance, said law shall be interpreted as if the words dissolution of marriage, declaration of invalidity of marriage, and legal separation, respectively, were substituted therefor.

14-10-104. *Uniformity of application and construction.* (1) This article shall be so applied and construed as to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact it.

(2) The term "irretrievable breakdown" shall be construed as being similar to other terms having a like import in the law of other jurisdictions adopting this or a similar law.

14-10-105. *Application of Colorado rules of civil procedure.* (1) The Colorado rules of civil procedure apply to all proceedings under this article, except as otherwise specifically provided in this article.

(2) A proceeding for dissolution of marriage, legal separation, or declaration of invalidity of marriage shall be entitled "In re the Marriage of . . . . . and . . . . ." A custody or support proceeding shall be entitled "In re the (Custody) (Support) of . . . . ."

(3) The initial pleading in all proceedings under this article shall be denominated a petition. A responsive pleading shall be denominated a response. Other pleadings and all pleadings in other matters under this article shall be denominated as provided in the Colorado rules of civil procedure.

14-10-106. *Dissolution of marriage - legal separation.* (1) (a) The district court shall enter a decree of dissolution of marriage when.

(I) The court finds that one of the parties has been domociled in this state for ninety days next preceding the commencement of the proceeding, but in no event shall a decree enter prior to ninety days after service of process; and

(II) The court finds that the marriage is irretrievably broken.

(b) In connection with every decree of dissolution of marriage and to the extent of its jurisdiction to do so, the court shall consider, approve, or make provision for child custody, the support of any child of the marriage who is entitled to support, the maintenance of either spouse, and the disposition of property; but the entry of a decree with respect to custody, support, maintenance, or disposition of property may be deferred by the court until a time subsequent to the decree of dissolution of marriage upon a finding that such deferral is necessary in the best interests of the parties.

(2) If a party requests a decree of legal separation rather than a decree of dissolution of marriage, the court shall grant the decree in that form unless the other party objects.

14-10-107. *Commencement - pleadings - abolition of existing defenses.* (1) All proceedings under this article shall be commenced in the manner provided by the Colorado rules of civil procedure.

(2) The petition in a proceeding for dissolution of

marriage or legal separation shall allege the marriage is irretrievably broken and shall set forth:

(a) The residence of each party and the length of residence in this state;

(b) The date and place of the marriage;

(c) The date on which the parties separated;

(d) The names, ages, and addresses of any living children of the marriage and whether the wife is pregnant;

(e) Any arrangements as to the custody and support of the children and the maintenance of a spouse; and

(f) The relief sought.

(3) Either or both parties to the marriage may initiate the proceeding.

(4) Upon the commencement of a proceeding by one of the parties, the other party shall be personally served in the manner provided by the Colorado rules of civil procedure, and he may file a response in accordance with such rules, except that, upon motion verified by the oath of the party commencing the proceeding or of someone in his behalf for an order of publication stating the facts authorizing such service, and showing the efforts, if any, which have been made to obtain personal service within this state, and giving the address or last known address of each person to be served or stating that his address and last known address are unknown, the court shall hear the motion ex parte and, if satisfied that due diligence has been used to obtain personal service within this state or that efforts to obtain the same would have been to no avail, shall order one

publication of a consolidated notice in a newspaper published or having general circulation in the county in which the proceeding is filed, notwithstanding the provisions of article 70 of title 24 C.R.S. 1973. A consolidated notice shall be published at least once during a calendar month and shall list the proceedings filed subsequent to those named in the previously published consolidated notice, stating as to each proceeding the names of the parties, the action number, the nature of the action, that a copy of the petition and summons may be obtained from the clerk of the court during regular business hours, and that default judgment may be entered against that party upon whom service is made by such notice if he fails to appear or file a response within thirty days after the date of publication. Costs of publication of a consolidated notice may be assessed pro rata to each of the proceedings named in the notice; except that, if a party is indigent or otherwise unable to pay such publication costs, the costs shall be paid by the court from funds appropriated for the purpose. Service shall be complete upon such publication, and a response or appearance by the party served by publication under this subsection (4) shall be made within thirty days thereafter, or default judgment may be entered. No later than the day of publication, the clerk of the court shall also post for thirty consecutive days a copy of the process on a bulletin board in his office, and shall mail a copy of the process to the other party at his last known address, and shall place in the file of the proceeding his certificate of posting and mailing. Proof of publication of the consolidated notice shall be by placing in the file a copy of the affidavit of publication, certified by the clerk of the court to be a true and correct copy of the original affidavit on file in the clerk's office.

(5) Defenses to divorce and legal separation existing prior to January 1, 1972, including but not limited to

condonation, connivance, collusion, recrimination, insanity, and lapse of time, are hereby abolished.

(6) All issues raised by these proceedings shall be resolved by the court sitting without a jury.

14-10-108. *Temporary order or temporary injunction.* (1) In a proceeding for dissolution of marriage, legal separation, or child custody or a proceeding for disposition of property, maintenance, or support following dissolution of the marriage, either party may move for temporary payment of debts, use of property, maintenance, custody, support of a child of the marriage entitled to support, or payment of attorney fees. The motion may be supported by an affidavit setting forth the factual basis for the motion and the amounts requested.

(2) As a part of a motion for such temporary orders or by an independent motion accompanied by an affidavit, either party may request the court to issue a temporary injunction.

(a) Restraining any party from transferring encumbering, concealing, or in any way disposing of any property, except in the usual course of business or for the necessities of life, and, if so restrained, requiring him to notify the moving party of any proposed extraordinary expenditures and to account to the court for all extraordinary expenditures made after the order is issued;

(b) Enjoining a party from molesting or disturbing the peace of the other party or of any child,

(c) Excluding a party from the family home or from the home of the other party upon a showing that physical or emotional harm would otherwise result.

(3) The court may issue a temporary restraining order without requiring notice to the other party only if it finds, on the basis of the moving affidavit or other evidence, that irreparable injury would result to the moving party if no order were issued until the time for responding had elapsed.

(4) On the basis of the showing made, the court may issue a temporary injunction and such temporary orders as are just and proper in the circumstances.

(5) A temporary order or temporary injunction:

(a) Does not prejudice the rights of the parties or the child which are to be adjudicated at subsequent hearing in the proceeding;

(b) May be revoked or modified prior to final decree on a showing by affidavit of the facts necessary to revocation or modification of a final decree under section 14-10-122, and

(c) Terminates when the final decree is entered, unless continued by the court for good cause to a date certain, or when the petition for dissolution or legal separation is voluntarily dismissed.

14-10-109. *Enforcement of restraining orders.* Whenever there is exhibited to any duly authorized sheriff or police officer a certified copy of a restraining order issued by any district court, as provided for in section 14-10-108, restraining and enjoining any person from threatening, beating, striking, or assaulting any other person, or requiring the person to remove himself from certain premises and to refrain from loitering, entering, or remaining near the premises thereafter, or requiring the doing or refrain-

ing from doing of any other act stated therein, and the copy of the restraining order shows, under signature of the person so serving, that a copy of the order has been properly served upon the person named in the order, and the person namd commits an obvious violation of its terms, it is the duty of the sheriff or police officer to remove the violator from the premises or to arrest said violator and take him immediately before the court issuing the restraining order or, if that court is not in session, to the nearest jail until the convening of its next session to await further action for the violation.

14-10-110. *Irretrievable breakdown.* (1) If both of the parties by petition or otherwise have stated under oath or affirmation that the marriage is irretrievably broken or one of the parties has so stated and the other has not denied it, there is a presumption of such fact, and, unless controverted by evidence, the court shall, after hearing, make a finding that the marriage is irretrievably broken.

(2) If one of the parties has denied under oath or affirmation that the marriage is irretrievably broken, the court shall consider all relevant factors, including the circumstances that gave rise to the filing of the petition and the prospect of reconciliation, and shall:

(a) Make a finding whether the marriage is irretrievably broken; or

(b) Continue the matter for further hearing not less than thirty days nor more than sixty days later, or as soon thereafter as the matter may be reached on the court's calendar, and may suggest to the parties that they seek counseling. At the adjourned hearing, the court shall make a finding whether the marriage is irretrievably broken.

14-10-111. *Declaration of invalidity.* (1) The district court shall enter its decree declaring the invalidity of a marriage entered into under the following circumstances:

(a) A party lacked capacity to consent to the marriage at the time the marriage was solemnized, either because of mental incapacity or infirmity or because of the influence of alcohol, drugs, or other incapacitating substances.

(b) A party lacked the physical capacity to consummate the marriage by sexual intercourse, and the other party did not at the time the marriage was solemnized know of the incapacity.

(c) A party was under the age as provided by law and did not have the consent of his parents or guardian or judicial approval as provided by law.

(d) One party entered into the marriage in reliance upon a fraudulent act or representation of the other party, which fraudulent act or representation goes to the essence of the marriage.

(e) One or both parties entered into the marriage under duress exercised by the other party or a third party, whether or not such other party knew of such exercise of duress.

(f) One or both parties entered into the marriage as a jest or dare.

(g) The marriage is prohibited by law, including the following:

(I) A marriage entered into prior to the dissolution of an earlier marriage of one of the parties;

(II) A marriage between an ancestor and a decendant or between a brother and a sister, whether the relationship is by the half or the whole blood or by adoption;

(III) A marriage between an uncle and a niece or between an aunt and a nephew, whether the relationship is by the half or the whole blood, except as to marriages permitted by the established customs of aboriginal cultures;

(IV) A marriage which was void by the law of the place where such marriage was contracted.

(2) A declaration of invalidity under subsection (1) of this section may be sought by any of the following persons and shall be commenced within the times specified, but in no event may a declaration of invalidity be sought after the death of either party to the marriage, except as provided in subsection (3) of this section:

(a) For the reasons set forth in either subsection (1) (a), (1) (d), (1) (e), or (1) (f) of this section, by either party to the marriage who was aggrieved by the conditions or by the legal representative of the party who lacked capacity to consent no later than six months after the petitioner obtained knowledge of the described condition;

(b) For the reason set forth in subsection (1) (b) of this section, by either party no later than one year after the petitioner obtained knowledge of the described condition;

(c) For the reason set forth in subsection (1) (c) of this section, by the underaged party, his parent, or his guardian, if such action for declaration of invalidity of

marriage is commenced within twenty-four months of the date the marriage was entered into.

(3) A declaration of invalidity, for the reason set forth in subsection (1) (g) of this section, may be sought by either party; by the legal spouse in case of bigamous, polygamous, or incestuous marriages, by the appropriate state officials, or by a child of either party at any time prior to the death of either party or prior to the final settlement of the estate of either party and the discharge of the personal representative, executor, or administrator of the estate or prior to six months after an estate is closed under section 15-12-1204, C.R.S. 1973.

(4) Children born of a marriage declared invalid are legitimate.

(5) Marriages declared invalid under this section shall be so declared as of the date of the marriage.

(6) The provisions of this article relating to the property rights of spouses, maintenance, and support and custody of children on dissolution of marriage are applicable to decrees of invalidity of marriage.

(7) No decree shall be entered unless one of the parties has been domiciled in this state for thirty days next preceding the commencement of the proceeding or unless the marriage has been contracted in this state.

14-10-112. *Separation agreement.* (1) To promote the amicable settlement of disputes between the parties to a marriage attendant upon their separation or the dissolution of their marriage, the parties may enter into a written separation agreement containing provisions for the maintenance of either of them, the disposition of any prop-

erty owned by either of them, and the custody, support, and visitation of their children.

(2) In a proceeding for dissolution of marriage or for legal separation, the terms of the separation agreement, except terms providing for the custody, support, and visitation of children, are binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties, on their own motion or on request of the court, that the separation agreement is unconscionable.

(3) If the court finds the separation agreement unconscionable, the court may request the parties to submit a revised separation agreement, or the court may make orders for the disposition of property, support, and maintenance.

(4) If the court finds that the separation agreement is not unconscionable as to support, maintenance, and property:

(a) Unless the separation agreement provides to the contrary, its terms shall be set forth in the decree of dissolution or legal separation, and the parties shall be ordered to perform them, or

(b) If the separation agreement provides that its terms shall not be set forth in the decree, the decree shall identify the separation agreement and shall state that the court has found the terms not unconscionable.

(5) Terms of the agreement set forth in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, but are no longer enforceable as contract terms.

(6) Except for terms concerning the support, custody, or visitation of children, the decree may expressly preclude or limit modification of terms set forth in the decree if the separation agreement so provides.

14-10-113. *Disposition of property.* (1) In a proceeding for dissolution of marriage or in a proceeding for legal separation or in a proceeding for disposition of property following the previous dissolution of marriage by a court which at the time of the prior dissolution of the marriage lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property, the court shall set apart to each spouse his property and shall divide the marital property, without regard to marital misconduct, in such proportions as the court deems just after considering all relevant factors including:

(a) The contribution of each spouse to the acquisition of the marital property, including the contribution of a spouse as homemaker;

(b) The value of the property set apart to each spouse;

(c) The economic circumstances of each spouse at the time the division of property is to become effective, including the desirability of awarding the family home or the right to live therein for reasonable periods to the spouse having custody of any children, and

(d) Any increases or decreases in the value of the separate property of the spouse during the marriage or the depletion of the separate property for marital purposes.

(2) For purposes of this article only, "marital prop-

erty" means all property acquired by either spouse subsequent to the marriage except:

(a) Property acquired by gift, bequest, devise, or descent;

(b) Property acquired in exchange for property acquired prior to the marriage or in exchange for property acquired by gift, bequest, devise, or descent;

(c) Property acquired by a spouse after a decree of legal separation; and

(d) Property excluded by valid agreement of the parties.

(3) All property acquired by either spouse subsequent to the marriage and prior to a decree of legal separation is presumed to be marital property, regardless of whether title is held individually or by the spouses in some form of coownership such as joint tenancy, tenancy in common, tenancy by the entirety, and community property. The presumption of marital property is overcome by a showing that the property was acquired by a method listed in subsection (2) of this section.

(4) An asset of a spouse acquired prior to the marriage or in accordance with subsection (2) (a) or (2) (b) of this section shall be considered as marital property, for purposes of this article only, to the extent that its present value exceeds its value at the time of the marriage or at the time of acquisition if acquired after the marriage.

(5) For purposes of this section only, property shall be valued as of the date of the decree or as of the date of the hearing on disposition of property if such hearing precedes the date of the decree.

14-10-114. *Maintenance.* (1) In a proceeding for dissolution of marriage or legal separation or a proceeding for maintenance following dissolution of marriage by a court, the court may grant a maintenance order for either spouse only if it finds that the spouse seeking maintenance.

(a) Lacks sufficient property, including marital property apportioned to him, to provide for his reasonable needs, and

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian,

(b) Is unable to support himself through appropriate employment or is the custodian of a child whose condition or circumstances make it appropriate that the custodian not be required to seek employment outside the home.

(2) The maintenance order shall be in such amounts and for such periods of time as the court deems just, without regard to marital misconduct, and after considering all relevant factors including:

(a) The financial resources of the party seeking maintenance, including marital property apportioned to him, and his ability to meet his needs independently, including the extent to which a provision for support of a child living with the party includes a sum for that party as custodian;

(b) The time necessary to acquire sufficient education or training to enable the party seeking maintenance to find appropriate employment;

(c) The standard of living established during the marriage;

(d) The duration of the marriage,

(e) The age and the physical and emotional condition of the spouse seeking maintenance; and

(f) The ability of the spouse from whom maintenance is sought to meet his needs while meeting those of the spouse seeking maintenance.

14-10-115. *Child support.* (1) In a proceeding for dissolution of marriage, legal separation, maintenance, or child support, the court may order either or both parents owing a duty of support to a child of the marriage to pay an amount reasonable or necessary for his support, without regard to marital misconduct, after considering all relevant factors including.

(a) The financial resources of the child;

(b) The financial resources of the custodial parent;

(c) The standard of living the child would have enjoyed had the marriage not been dissolved;

(d) The physical and emotional condition of the child and his educational needs, and

(e) The financial resources and needs of the noncustodial parent.

14-10-117. *Payment of maintenance or support to court.* (1) Upon its own motion or upon motion of either party, the court may at any time order that maintenance or support payments be made to the clerk of the court, as trustee, for remittance to the person entitled to receive the payments.

(2) The clerk of the court shall maintain records listing the amount of payments, the date when payments are required to be made, and the names and addresses of the parties affected by the order.

(3) The parties affected by the order shall inform the clerk of the court of any change of address or of other conditions that may affect the administration of the order.

(4) If a party fails to make the required payment and qualifies under section 14-6-112 or section 14-10-116, the clerk of the court shall send by registered or certified mail notice of the arrearage to the obligor. If payment of the sum due is not made to the clerk of the court within ten days after sending notice, the clerk may initiate contempt proceedings against the obligor or refer the matter to the attorney representing the party or the attorney appointed under section 14-10-116 for further proceedings.

(5) The district attorney shall assist the court on behalf of a person entitled to receive maintenance or support in all proceedings initiated under this section to enforce compliance with the order.

(6) If the person obligated to pay support has left or is beyond the jurisdiction of the court, the district attorney may institute any other proceeding available under the laws of this state for the enforcement of duties of support and maintenance.

14-10-118. *Assignments and enforcement of orders.* (1) The court may order the person obligated to pay support or maintenance to make an assignment of a part of his periodic earnings or trust income to the person entitled to receive the payments. The assignment is binding on the employer, trustee, or other payor of the funds two weeks after service upon him of notice that it has been made. The payor shall withhold from the earnings or trust income payable to the person obligated to support the amount specified in the assignment and shall transmit the payments to the person specified in the order. The payor may deduct from each payment a sum not exceeding one dollar as reimbursement for costs. An employer shall not discharge or otherwise discipline an employee as a result of a wage or salary assignment authorized by this section. This section shall not apply to trusts commonly referred to as "spendthrift trusts".

(2) The court has the power to require security to be given to insure enforcement of its orders, in addition to other methods of enforcing court orders prescribed by statute or by the Colorado rules of civil procedure on or after July 6, 1973.

14-10-119. *Attorney's fees.* The court from time to time, after considering the financial resources of both parties, may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this article and for attorney's fees, including sums for legal services rendered and costs incurred

prior to the commencement of the proceeding or after entry of judgment. The court may order that the amount be paid directly to the attorney, who may enforce the order in his name.

14-10-120. *Decree.* (1) A decree of dissolution of marriage or of legal separation is final when entered, subject to the right of appeal. An appeal from the decree of dissolution that does not challenge the finding that the marriage is irretrievably broken does not delay the finality of that provision of the decree which dissolves the marriage beyond the time for appealing from that provision, so that either of the parties may remarry pending appeal.

(2) No earlier than six months after entry of a decree of legal separation, on motion of either party, the court shall convert the decree of legal separation to a decree of dissolution of marriage.

(3) The clerk of the court shall give notice of the entry of a decree of dissolution to the office of state registrar of vital statistics in the division of administration of the department of health, which office shall make this information available to the public upon request.

(a) If the marriage is registered in this state, to the county clerk of the county where the marriage is registered, and the county clerk shall enter the fact of dissolution in his records; or

(b) If the marriage is registered in another jurisdiction, to the appropriate official of that jurisdiction, with the request that he enter the fact of dissolution in the appropriate record.

(4) No decree that may enter shall relieve a spouse

from any obligation imposed by law as a result of the marriage for the support or maintenance of a spouse determined to be mentally incompetent by a court of competent jurisdiction prior to the decree, unless such spouse has sufficient property or means of support.

14-10-121. *Independence of provisions of decree or temporary order.* If a party fails to comply with a provision of a decree or temporary order or injunction, the obligation of the other party to make payments for support or maintenance or to permit visitation is not suspended; but he may move the court to grant an appropriate order.

14-10-122. *Modification and termination of provisions for maintenance, support, and property disposition.* (1) Except as otherwise provided in section 14-10-112(6), the provisions of any decree respecting maintenance or support may be modified only as to installments accruing subsequent to the motion for modification and only upon a showing of changed circumstances so substantial and continuing as to make the terms unconscionable. The provisions as to property disposition may not be revoked or modified unless the court finds the existence of conditions that justify the reopening of a judgment.

(2) Unless otherwise agreed in writing or expressly provided in the decree, the obligation to pay future maintenance is terminated upon the death of either party or the remarriage of the party receiving maintenance.

(3) Unless otherwise agreed in writing or expressly provided in the decree, provisions for the support of a child are terminated by emancipation of the child but not by the death of a parent obligated to support the child. When a parent obligated to pay support dies, the amount of support may be modified, revoked, or commuted to a lump-sum

payment, to the extent just and appropriate in the circumstances.

14-10-123. *Commencement of custody proceedings - jurisdiction.* (1) A child custody proceeding is commenced in the district court or as otherwise provided by law.

(a) By a parent:

(I) By filing a petition for dissolution or legal separation; or

(II) By filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found, or

(b) By a person other than a parent, by filing a petition seeking custody of the child in the county where the child is permanently resident or where he is found, but only if the child is not in the physical custody of one of his parents; or

(c) By a person other than a parent who has had physical custody of a child for a period of six months or more, if such action is commenced within six months of the termination of such physical custody.

(2) Notice of a child custody proceeding shall be given to the child's parent, guardian, and custodian, who may appear and be heard and may file a responsive pleading. The court may, upon a showing of good cause, permit the intervention of other interested parties.

14-10-124. *Best interests of child.* (1) The court shall determine custody in accordance with the best interests of the child. In determining the best interests of the

child, the court shall consider all relevant factors, including:

(a) The wishes of the child's parents as to his custody;

(b) The wishes of the child as to his custodian;

(c) The interaction and interrelationship of the child with his parents, his siblings, and any other person who may significantly affect the child's best interests;

(d) The child's adjustment to his home, school, and community; and

(e) The mental and physical health of all individuals involved.

(2) The court shall not consider conduct of a proposed custodian that does not affect his relationship to the child.

14-10-125. *Temporary orders.* (1) A party to a custody proceeding may move for a temporary custody order. The motion shall be supported by an affidavit, as provided in section 14-10-132. The court may award temporary custody after a hearing or, if no objection, solely on the basis of the affidavits.

(2) If a proceeding for dissolution of marriage or legal separation is dismissed, any temporary custody order is vacated unless a parent or the child's custodian moves that the proceeding continue as a custody proceeding and the court finds, after a hearing, that the circumstances of the parents and the best interests of the child require that a custody decree be issued.

(3) If a custody proceeding commenced in the absence of a petition for dissolution of marriage or legal separation is dismissed, any temporary custody order is vacated.

14-10-126. *Interviews.* (1) The court may interview the child in chambers to ascertain the child's wishes as to his custodian. The court may permit counsel to be present at the interview. The court shall cause a record of the interview to be made, and it shall be made part of the record in the case.

(2) The court may seek the advice of professional personnel whether or not they are employed on a regular basis by the court. The advice given shall be in writing and shall be made available by the court to counsel of record, parties, and other expert witnesses upon request, but it shall otherwise be considered confidential and shall be sealed and shall not be open to inspection, except by consent of the court. Counsel may call for cross-examination any professional personnel consulted by the court.

14-10-127. *Investigations and reports.* (1) In all custody proceedings, the court shall, upon motion of either party or upon the court's own motion, order the court probation department or any county or district welfare department to investigate and file a written report concerning custodial arrangements for the child. Except as otherwise provided in this section, such report shall be considered confidential and shall not be available for public inspection unless by order of court. The cost of each investigation shall be based on an ability to pay and shall be assessed as part of the costs of the action or proceeding, and, upon receipt of such sum by the clerk of court, it shall be transmitted to the department or agency performing the investigation.

(2) In preparing his report concerning a child, the investigator may consult any person who may have information about the child and his potential custodial arrangements. Upon order of the court, the investigator may refer the child to professional personnel for diagnosis. The investigator may consult with and obtain information from medical, psychiatric, or other expert persons who have served the child in the past without obtaining the consent of the parent or the child's custodian; but the child's consent must be obtained if he has reached the age of sixteen unless the court finds that he lacks mental capacity to consent. If the requirements of subsection (3) of this section are fulfilled, the investigator's report may be received in evidence at the hearing.

(3) The court shall mail the investigator's report to counsel and to any party not represented by counsel and to any party not represented by counsel the investigator's file of underlying data and reports, complete texts of diagnostic reports made to the investigator pursuant to the provisions of subsection (2) of this section, and the names and addresses of all persons whom the investigator has consulted. Any party to the proceeding may call the investigator and any person whom he has consulted for cross-examination. No party may waive his right of cross-examination prior to the hearing.

14-10-128. *Hearings.* (1) Custody proceedings shall receive priority in being set for hearing.

(2) The court may tax as costs the payment of necessary travel and other expenses incurred by any person whose presence at the hearing the court deems necessary to determine the best interests of the child.

(3) The court without a jury shall determine questions of law and fact. If it finds that a public hearing may be detrimental to the child's best interests, the court may exclude the public from a custody hearing but may admit any person who has a direct and legitimate interest in the particular case or a legitimate educational or research interest in the work of the court.

(4) If the court finds it necessary in order to protect the child's welfare that the record of any interview, report, investigation, or testimony in a custody proceeding be kept secret, the court shall make an appropriate order sealing the record.

14-10-129. *Visitation.* (1) A parent not granted custody of the child is entitled to reasonable visitation rights unless the court finds, after a hearing, that visitation by the parent would endanger the child's physical health or significantly impair his emotional development.

(2) The court may make or modify an order granting or denying visitation rights whenever such order or modification would serve the best interests of the child; but the court shall not restrict a parent's visitation rights unless it finds that the visitation would endanger the child's physical health or significantly impair his emotional development.

14-10-130. *Judicial supervision.* (1) Except as otherwise agreed by the parties in writing at the time of the custody decree, the custodian may determine the child's upbringing, including his education, health care, and religious training, unless the court, after hearing and upon motion by the non-custodial parent, finds that, in the absence of a specific limitation of the custodian's authority, the child's physical health would be endangered or his emotional development significantly impaired.

(2) If both parents or all contestants agree to the order or if the court finds that in the absence of the order the child's physical health would be endangered or his emotional development significantly impaired, the court may order the county or district welfare department or the court's probation department to exercise continuing supervision over the case to assure that the custodial or visitation terms of the decree are carried out.

14-10-131. *Modification.* (1) If a motion for modification has been filed, whether or not it was granted, no subsequent motion may be filed within two years after disposition of the prior motion unless the court decides, on the basis of affidavits, that there is reason to believe that the child's present environment may endanger his physical health or significantly impair his emotional development.

(2) The court shall not modify a prior custody decree unless it finds, upon the basis of facts that have arisen since the prior decree or that were unknown to the court at the time of the prior decree, that a change has occurred in the circumstances of the child or his custodian and that the modification is necessary to serve the best interests of the child. In applying these standards, the court shall retain the custodian established by the prior decree unless:

(a) The custodian agrees to the modification;

(b) The child has been integrated into the family of the petitioner with the consent of the custodian; or

(c) The child's present environment endangers his physical health or significantly impairs his emotional development and the harm likely to be caused by a change of environment is outweighed by the advantage of a change to the child.

14-10-132. *Affidavit practice.* A party seeking a temporary custody order or modification of a custody decree shall submit, together with his moving papers, an affidavit setting forth facts supporting the requested order or modification and shall give notice, together with a copy of his affidavit, to other parties to the proceeding, who may file opposing affidavits. The court shall deny the motion unless it finds that adequate cause for hearing the motion is established by the affidavits, in which case it shall set a date for hearing on an order to show cause why the requested order or modification should not be granted.

14-10-133. *Effective date - applicability.* This article shall take effect January 1, 1972, and shall apply only to actions affected by this article which are commenced on or after such date; all such actions commenced prior to said date shall be governed by the laws then in effect.